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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 962 106

STATE OF ALASKA, *Petitioner*,

v.

ARCTIC MAID AND ARCTIC MAID FISHERIES, INC., *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC REEFER AND PACIFIC REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

PACIFIC QUEEN AND PACIFIC QUEEN FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

ALASKA REEFER AND ALASKA REEFER FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTH STAR AND NORTH STAR FISHERIES, *Respondent*.

STATE OF ALASKA, *Petitioner*,

v.

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY AND REEFER II, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MISCELLANEOUS:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit, entered in the above entitled causes on March 23, 1960.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court for the Territory of Alaska, Division Number One, at Juneau, entered March 17, 1956, reported at 140 F. Supp. 190, and a supplemental opinion of that court entered May 25, 1956, are set forth on pages 60 and 82 of the Record. The opinion of the United States Court of Appeals for the Ninth Circuit, dated March 16, 1959, is attached to this petition as an Exhibit "A". The opinion and judgment of the Ninth Court of Appeals, dated March 23, 1960, superseding the earlier decision of that court, is attached to this petition as an Exhibit "B".

JURISDICTION

These causes were first heard before the District Court for the Territory of Alaska, Division Number One. The jurisdiction of the District Court was invoked because the causes arose before Alaska became a state during which time the District Court under the Act of June 6, 1900, c. 786, 31 Stat. 322, as amended, 48 U.S.C., § 101, had jurisdiction of both matters over which state courts ordinarily have jurisdiction and matters over which federal courts have jurisdiction. On May 25, 1956, judgment was entered by the District Court. These causes were then appealed by respondents to the United States Court of Appeals for the Ninth Circuit under Title 28, U.S.C., Sections 1291 and 1294(2) and were heard by a division of that court. On March 16, 1959, the Ninth Court of Appeals entered an opinion and a judgment vacating the judgment of the District Court and remanding the causes for a

redetermination of the taxes (which were the subject of these causes) according to the court's opinion and for re-examination of the status of a tax lien in one of the causes. On November 9, 1959, a rehearing of the matter was granted by the Court. On March 23, 1960, after the causes were heard and submitted to the Court en banc an opinion and judgment were entered reversing the District Court and remanding the causes with directions to enter judgment for appellants on the tax claims, and to adjudicate the counter claims (for taxes paid under the tax statute held to be invalid).

The jurisdiction of the Supreme Court to review this judgment is invoked under Title 28, United States Code Section 1254(1).

QUESTIONS PRESENTED

1. Whether a tax on the freezer ship line of business carried on in connection with Alaska's commercial fisheries, which tax is based upon an annual license tax measured by 4% of the value of the fisheries products bought or otherwise obtained for freezing, is (a) a tax on the taking of fish (as the trial court held), (b) a tax on the entire operation of freezer ships to the extent that such operations occur within Alaska's taxing jurisdiction (as the Ninth Court of Appeals first held), or (c) a tax only on the "processing of fish by freezing" (as the Ninth Court of Appeals held on rehearing).

2. Whether freezer ships, which lie off the three mile limit of Alaska (or, if Bristol Bay is an inland bay of Alaska, within Alaskan waters), and which send their catcher boats within Alaskan waters to catch salmon, and which freeze such fish caught within Alaskan waters and also fish purchased from independent fisher-

men, pending their transportation to Seattle, Washington, are engaged in interstate commerce and for that reason exempt from the Alaska annual license tax?

3. Whether the fact that an integral part of the operation of a freezer ship in Alaska is the catching of salmon within Alaska waters and preserving the fish obtained is sufficient to characterize the business of a freezer ship as being local in nature, and therefore, not a part of interstate commerce?

STATUTES INVOLVED

The statute involved is Chapter 116, Session Laws of Alaska 1951, and in particular Section 1(b) of that statute. The statute provides:

"Amending Section 1 of Chapter 97, Session Laws of Alaska, 1949 imposing a license tax on freezer ships and other floating cold storages; and declaring an emergency.

"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Section 1 of Chapter 97, Session Laws of Alaska, 1949, is hereby amended to read as follows:

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. *Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:*

"(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries

otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

(b) *Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.*"

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval."

"Approved March 24, 1951."

In order to present to the Court a picture of the Alaska program for taxing fish processors applicable portions of the following statutes will be referred to and are printed in the Appendix as follows: Sec. 1, Ch.

82, SLA 1949—Exhibit "C"; Sec. 1, Ch. 97, SLA 1949—Exhibit "D"; Ch. 113, SLA 1951—Exhibit "E".

STATEMENT

Beginning in approximately 1950 freezer ships owned by the respondents have visited the Alaska coast to launch "catcher" boats to be used in taking salmon within three miles of the low tide mark along the Alaska shore-line. On occasion some of the freezer ships have purchased salmon from independent fishermen.

The great bulk of the operations of the freezer ships are carried on in Bristol Bay. Bristol Bay is a large very shallow bay formed to a large extent by the estuaries of the Nushagak, Kvichak and Egekik Rivers. For the Court's convenience a map of Bristol Bay is attached as an Exhibit "F". Bristol Bay is the major fishing ground in Alaska and the world for red (sockeye) salmon. When operating in Bristol Bay the freezer ships anchor seaward of a line drawn parallel to and at a distance of three miles from mean low tide where they serve as a base for their catcher boats. When operating near Kodiak Island and in southeastern Alaska they anchor closer to shore and obtain fish from catcher boats while so positioned.

When a catcher boat has made its catch, it returns to the freezer ship and unloads. The fish are immediately frozen in brine and stored. At the end of the season the catcher boats are loaded on the freezer ships and the freezer ships return to canneries on Puget Sound with their catch. There the respondents unload, thaw and can the fish. (R. 37-42).

Beginning in 1949 the Territory of Alaska instituted a policy of taxing all fish processors engaged in busi-

ness "in connection with Alaska's fisheries". The first of such legislation was a 1949 Act taxing the business of salmon canneries by a tax measured by the value of salmon purchased or otherwise obtained for processing. The rate of the tax was set at 4 per cent of the value of the salmon so obtained. Salmon cold storages freezing fish for the fresh fish market were similarly taxed at 1 per cent, herring processing plants at 1 per cent, crab canneries at 1 per cent and clam canneries at 2 per cent, except for butter clam canneries which were taxed at 1 per cent. See Chapter 82, SLA 1949 which is attached to this petition as an Exhibit "C".

Later in that same session cold storages and fish processors not already taxed were made subject to a tax measured by 1 per cent of the values of fisheries products purchased or otherwise obtained for processing. See Chapter 97, SLA 1949 which is attached to this petition as an Exhibit "D".

In 1951 the tax on salmon canneries was increased to 6 per cent. See Chapter 113, SLA 1951 attached as an Exhibit "E". In the same year Ch. 97, SLA 1951 was amended by Ch. 116, SLA 1951 to bring freezer ships and floating cold storages "in connection with Alaska's fisheries" within the scope of the Alaska tax program for taxing fish processors. The prosecution of the freezer ship line of business in Alaska was made a taxable incident and the measure of the tax was set at 4 per cent of the value of fisheries products purchased or otherwise obtained for processing through freezing.

In 1955 the Territory of Alaska brought suit against six freezer ship operators to collect $116,731.53 claimed to be owing under the provisions of Ch. 116, SLA 1951 for taxes, penalties, and interest for the years 1951-1955.

The freezer ship operators attacked Ch. 116, SLA 1951 on several grounds alleging: (1) repugnance of the statute to the Constitution and federal statutes, (2) that the tax, because of the territorial limits of Alaska's taxing jurisdiction, does not apply to fish on board the freezer ship when it is more than three miles from shore, even though the fish have been caught within the three-mile distance, and (3) that the tax applies only to fish obtained for freezing and that freezer ships obtaining their fish for canning.

On March 17, 1956, the trial court upheld the tax finding that the taxable event was the taking of the fish and that the tax applied to all fish obtained by the freezer ships. *Territory of Alaska* v. *The Arctic Maid*, Alaska 1956, 140 F. Supp. 190 (R. 60, 82).

The freezer ship operators then prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit where the case was argued before a division of that court. On March 16, 1959, the Ninth Court of Appeals held that the incidence of the tax was on the operation of freezer ships, that the tax could only apply to operations of freezer ships within Alaska's taxing jurisdiction, that catcher boats operated by the freezer ship itself are but an extension of the ship's operations and that the freezer ships were subject to taxation measured by the value of the fish obtained by their catcher boats. The court ruled that the freezer ships were not required to pay Alaska taxes on fish obtained within Alaskan waters by independent catcher boats but purchased by the freezer ships outside of those waters. The Court also ruled that part but not all of Bristol Bay is within the taxing jurisdiction of the State of Alaska. See Exhibit "A" for a copy of that opinion.

On November 8, 1959, the Ninth Court of Appeals granted a rehearing. The case was then argued before the Court en banc. On March 23, 1960 the Court filed its opinion. The Court first held that the taxable event was the freezing of fish and then applying the "loading and unloading" test of *Joseph* v. *Carter & Weekes Co.*, 330 U.S. 422, 433 (1947) and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 83 (1946), held that the freezing and cold storage activity of freezer ships takes place after the flow of interstate commerce has begun, that the activity of freezing and cold storing fish, engaged in by freezer ships while lying at anchor in territorial waters preparatory to transporting such fish to the State of Washington for canning is an inseparable part of interstate commerce, and that any territorial privilege tax on such activity is forbidden by the Commerce Clause. See Exhibit "B".

REASONS FOR GRANTING WRIT

I

The Incidence of the Tax is on the Carrying on of Any Part of a Freezer Ship Business That Occurs Within Alaskan Waters, and Is Not on the "Freezing of Fish"

The United States Court of Appeals for the Ninth Circuit confused the incidence of the tax and the measure of the tax. A reading of the statute will quickly reveal that the taxable event is the prosecution of the freezer ship line "of business in connection with Alaska fisheries." There is no justification in looking further into the tax statute to determine whether or not the measure of the tax broadens or narrows this event. However, even if this is done it will be seen that there is nothing in the measure of the tax to further define the taxable event. The measure is four per cent of the value of raw fish "bought or otherwise obtained for

processing through freezing." The words "through freezing" are surplusage since a freezer ship is engaged in the business of a freezer ship only when and to the extent that it freezes fish obtained. To the extent that it uses fish for some other purpose, to that extent it is engaged in another line of business, and it would, to that extent, be taxed under the appropriate Alaska processor tax. For example, if the ship obtained the fish for canning it would be taxed as a floating cannery at six percent of the value of the fish obtained for canning.

The Ninth Court of Appeals dwelled on the words "processing through freezing" and concluded that this put the emphasis on only one of the many phases of a freezer ship operation in Alaska (Exhibit B, p. 8). Under this construction of a business license statute the tax is not on the whole business of the taxpayers occurring within Alaska, but only one narrow aspect of it. This is an exceedingly odd construction of a business license tax. If any emphasis is to be placed on the language defining the measure of the tax it should be placed on the words "bought or otherwise obtained", that is, the taking of the fish. This was the ruling of the trial court.

We believe that the Ninth Court of Appeals was correct the first time it heard the case and found the taxable event to be that portion of the freezer ship's operations which occur in Alaska's taxing jurisdiction.

Each of the three times these cases have been before United States Courts the taxable incident has been found at a different place. A decision by the United States Supreme Court distinguishing between the incidence of a tax and the measure of a tax would obvi-

ously have a healthy effect in making the decisions of courts more predictable and should clear away much of the confusion that now exists in construing tax statutes.

The construction of the statute by the Ninth Court of Appeals is particularly unfortunate for the State of Alaska since it makes it impractical for the state to appeal this matter to the Supreme Court under Title 28, U.S.C., § 1254(2). Although the major impact and unsettling effect of the court's opinion is in connection with the Commerce Clause of the United States Constitution it is impossible to properly reach this constitutional question affecting a state statute without first defining the taxable event. This can be done only by applying for a writ of certiorari.

II

Freezer Ships, in Taking and Processing Fish By Freezing, Are Not Engaged in Interstate Commerce, But Are Instead Engaged in Business of a Local Nature

The Ninth Court of Appeals has held that freezer ships cannot be taxed under the Alaska freezer ship tax because their activities are inseparable from interstate commerce. For purposes of analyzing the problem the court referred to cases involving business activities which are entirely and classically interstate in nature. Among the cases referred to are a stevedoring case [*Joseph* v. *Carter & Weekes Co.*, 330 U.S. 422, 433 (1947)], an oil tanker case [*Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 83 (1946)] and a natural gas transmission line case [*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 163-164 (1954)]. This line of cases, along with common carrier and communications cases, represent one clear

line of authority. These cases all relate to businesses the major purpose of which is to transport goods and services in interstate commerce. None of these cases relate to businesses which are partially or entirely engaged in activities of a purely local nature such as fishing, mining and the extraction of oil and gas resources.

The court discussed but refused to follow another clear line of authorities regarding the taxation of businesses which take or extract resources for later shipment in interstate commerce represented by *Toomer* v. *Witsell*, 334 U.S. 385 (1948) (taking of shrimp in coastal waters of South Carolina) and *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923) (mining of iron ore). The rule in the two foregoing cases is that a tax on the extraction of resources does not burden interstate commerce since the taxable event, the severing of the resources, occurs before the resources can be said to have entered the flow of interstate commerce. By the same token the preservation of resources just severed is so closely tied in with the taking of the resources that it too must be considered local in nature and as occurring before the resources can be said to have entered the flow of interstate commerce. The *Oliver Iron Mining Co.* case *supra*, is particularly in point since the United States Supreme Court sustained a tax upon the mining of ore although substantially all the ore left the State and was put upon cars for that purpose by the same act by which it was produced.

The Ninth Court of Appeals by placing an extractive preservation type industry under transportation and oil pipeline cases has undermined the authority of the *Toomer* and *Oliver Mining Company* cases *supra*. By its decision it has unnecessarily obscured and con-

fused the once clear distinction between cases dealing with common carriers and the interstate shipment of materials and services and cases dealing with the extraction of resources and the immediate preservation of resources severed.

We believe that the following from Paul J. Hartman, *State Taxation of Interstate Commerce* (Dennis & Co., Inc.), 1953 ed., at p. 99, correctly expresses the rule:

> "Where, however property has not begun to move in interstate commerce, it is not immune from various state privilege taxes, although the property ultimately will be transported beyond the borders of the taxing state. Even the fact that goods are being processed or prepared for an interstate journey has not exempted from various sorts of nondiscriminatory privilege taxes either the processing or preparing of the articles themselves, or those who manufactured or otherwise processed or prepared the article for the interstate passage."

In support of this rule see *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927) (privilege tax on "producers of natural gas reckoned according to the value of that commodity at the well," upheld); *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932) (license tax on manufacture, generation or production of electricity, upheld); *Chassaniol* v. *City of Greenwood*, 291 U.S. 584 (1934) (occupation tax on buying and selling cotton locally, produced, processed and warehoused after it had been ginned and before its shipment to other states, upheld); *Coverdale* v. *Arkansas-Louisiana Pipeline Co.*, 303 U.S. 604 (1939) (privilege tax on production of mechanical power used to operate compressor which increases pressure of natural gas permitting gas to be transported to purchasers in other states, upheld); *Empresa Siderurgica S. A.* v. *County of Merced*, 32

Cal. 2d 68, 194 P. 2d 527, 11 ALR 2d 934 (1948) (property tax on cement plant in process of being dismantled and packaged by trucking company (licensed as a common carrier) for shipment to Columbia, upheld). *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra* can be distinguished since there the tax was levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing. *Richfield Oil Corp.* v. *State Board of Equalization, supra*, can be similarly distinguished. In the case at bar the tax falls *on* the production, gathering and processing of fish *before* they are transported from Alaska.

If the major activities of a freezer ship were merely the purchasing, freezing and shipment of salmon, then perhaps the freezing part of the operation could be most logically tied in with the later shipment of the fish to another state. However, here the freezer ships are engaged in catching fish and freezing fish until a full freezer ship load of fish is obtained. The freezing of fish is geared to the preserving of the fish as they are caught. For that reason a freezer ship's operation is not analogous to refrigerated box cars running back and forth from farming areas to market or to an oil tanker plying between ports. The analogy is closer to the dairyman who produces milk and chills it until he can get it to the market or to the pea farmer who is engaged in the raising and freezing of peas. That portion of a freezer ship operation which occurs in Alaska should be characterized as being local since the freezing done in Alaska grows directly out of the extractive operation of the freezer ships and before any attempt is made to move the processed product to market. The fact that the freezing of the fish caught occurs on water

rather than land is of no particular relevance or significance. It merely means that the appellants are somewhat more mobile than their land based competitors.

Even if the taxable event were the freezing and the freezing alone, under these circumstances the freezing is an activity which is local in nature and which takes place before the product so processed enters the flow of interstate commerce. The chief reason that this construction of the freezer ship tax statute is objectionable is that it may have the effect of placing the bulk of the otherwise taxable freezer ship activities outside of the geographic limits of Alaska's taxing jurisdiction.[1]

[1] If the Ninth Court of Appeals in its first decision of March 16, 1959 is correct a good part of the freezing activities of the freezer ships takes place outside of the taxing jurisdiction of Alaska. That court declared most of Bristol Bay to be outside of Alaska's taxing jurisdiction. Under that decision the only part of much of the freezer ships operations the Alaska tax could reach would be the fishing operations of the freezer ships carried on by their catcher boats. Under that decision the freezing would in many, and perhaps most cases, occur outside of Alaska's taxing jurisdiction.

Alaska strongly maintains however that the portion of Bristol Bay east of a line drawn from Cape Newenham to a point 3 miles south of Cape Menshikof is within Alaska's jurisdiction for both taxation and conservation purposes. In support of this the State of Alaska points to a 36 year history of exclusive control over Bristol Bay by the Federal Government for conservation purposes under fish and wildlife regulations promulgated under the Act of June 26, 1906, c. 3547, 34 Stat. 478, 48 U.S.C. §§ 230, 231, 235-239, 241, 242 (beginning with Department of Commerce Circular No. 251, 9th Ed. dated Jan. 9, 1923 and ending with 24 FR 3265-3268), the long standing policy of excluding aliens from such waters under the Act of June 14, 1906, c. 3299, 34 Stat. 263, 48 U.S.C. §§ 244-247 and the policy of establishing closed seasons and similar conservation controls in only the waters "over which the United States has jurisdiction" as provided in the Act of June 6, 1924, 43 Stat. 464, c. 272, 48 U.S.C., §§ 225-228, relating to the "protection of fisheries in Alaska and for other purposes". Bristol

III

Any Attempt by Alaska to Correct the Discriminatory Effect of the Exemption of Freezer Ships Operations From State Taxation Would Require a Drastic Change in the Social, Economic and Political Approach to Taxation in Alaska

A review of the various fish processing taxes on fish processors described herein will reveal that it has been the policy of Alaska to insure that the taking of every fish, clam, crab and other fisheries products taken for commercial purposes in Alaska will result in the paying of tax revenues to Alaska and will contribute in meeting the costs of conserving Alaska's fisheries resources. It is also apparent that Alaska has seen fit to place the tax burden on fish processors and not on the fishermen.

The recent decision of the Ninth Court of Appeals creates a gaping hole in this tax structure. Now all but one class of fish processors processing fish in Alaska are taxed according to the value of the fish taken or obtained. There is now an exception for freezer ships. The taking or obtaining of fish by freezer ships will not now contribute to Alaska's tax revenues nor to the costs of maintaining Alaska's fisheries resources.

This discrimination is so unfair as to demand some correction. A solution is suggested in the next to-last paragraph of the opinion of the Ninth Court of Appeals:

> "Appellants make no contention that the activity of catching fish in Alaskan waters would not be amenable to a non-discriminatory local privileg

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Bay constitutes waters over which the United States has asserted such jurisdiction and for which closed seasons have been prescribed. Alaska succeeded to most of the Federal Government's responsibility for conservation of fish and wildlife resources in Alaska (including Bristol Bay), under Sec. 6(e) of the Act of July 1958, 72 Stat. 339 (the Alaska Statehood Act).

tax. Toomer v. Witsell, supra, establishes that such an activity may be taxed. . . ." (Exhibit B, p. 20a).

However, such a solution could only be adopted by abandoning a social, economic and political approach to taxation in Alaska which has been followed for more than 10 years. Presumably a tax could not be constitutionally devised which is levied only upon fish caught by freezer ships. If a severance tax should be placed on fish caught by freezer ships in lieu of a fish processor tax, it would also be necessary to impose severance taxes on all other fish caught in Alaska waters. There are obvious reasons why the Alaska legislature would be reluctant to shift the tax burden from a relatively few solvent fish processors to a large number of fishermen, many of whom are in a poor position to pay substantial severance taxes and many of whom are not accustomed to keeping tax records, or for that matter, records of any kind.

It is apparent that the recent decision of the Ninth Court of Appeals will have an unusual impact in Alaska. Not only does the State stand to lose more than $116,731.53 involved for the tax years 1950-1955, but it also stands to lose a similar sum for the years 1955-1960. If the discrimination against other fish processors in Alaska is permitted to continue for subsequent years the State will incur additional yearly losses in revenue, while at the same time, operators of freezer ships will continue to have an unfair competitive advantage over fish processors who are taxed. If on the other hand the State attempts to remedy this discrimination by shifting its fish taxes from the operations of the processors to the taking of fish by the fishermen it will subject a good portion of the Alaska

community to taxes which are not only unpopular among the persons which would then be taxed, but which are generally distasteful for social and economic reasons to the Alaska population at large.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

RALPH E. MOODY
Ralph E. Moody
Attorney General of Alaska

Counsel for Petitioner,
State of Alaska

Dated this 18th day of
May, 1960, at Juneau, Alaska.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,284

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,286

ALASKA REEFER and ALASKA REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,287

NORTH STAR and NORTH STAR FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,288

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

Mar. 16, 1959

Appeal from the United States District Court for the District of Alaska, First Division

Before: FEE and HAMLEY, Circuit Judges, and SOLOMON District Judge

SOLOMON, District Judge:

This is an appeal from a judgment requiring appellants to pay to the Territory of Alaska certain taxes imposed as license fees on the freezer ships which they operated in Alaskan waters during the years 1951-1954. These taxes were imposed by Chapter 97, §1, Session Laws of Alaska, 1949, as amended by Chapter 116, §1, Session Laws of Alaska, 1951.

Appellants, who are all citizens of the United States, are neither citizens nor residents of Alaska. They operate canneries located on Puget Sound in the State of Washington. In order to obtain fish for their canneries, they send freezer ships equipped with brine-freezing and cold storage facilities to Alaskan waters each year during the salmon fishing season. The fish are caught close to shore with gillnets or seines handled by men in small shallow-draft catcher

boats. The appellants operate some of these catcher boats and others are operated by their owners under contract with the appellants. Most of these boats are transported to and from Alaska aboard the freezer ship, which acts as mother ship for their operations. The freezer ships also obtain fish by purchase from independent fishermen operating their own catcher boats.

The freezer ships stay in deep water, more than three miles from shore in the Bristol Bay area but closer to shore in the Kodiak Island and southeastern Alaska fishing areas. When a catcher boat has its catch, it returns to the freezer ship and unloads. The fish are immediately frozen in brine and stored. At the end of each season the freezer ships return to the canneries on Puget Sound where the fish are thawed and then canned.

The freezer ship tax as provided in Chapter 97, as amended, amounts to 4% of the value of the raw fish bought or otherwise obtained by freezer ships or other floating cold storages for processing through freezing. The trial court found that the tax applied to all fish obtained by appellants. *Territory of Alaska* v. *The Arctic Maid*, Alaska 1956, 140 F. Supp. 490.

Appellants contend that the trial court erred in so holding for the following reasons: (1) the tax is void because it is part of a taxing system which conflicts with the Constitution and with federal statutes; (2) the tax, because of the territorial limits of Alaskan jurisdiction, does not apply to fish taken on board the freezer ship when it is more than three miles from shore, even though the fish have been caught within the three-mile distance; and (3) appellants obtained their fish for canning, and therefore the tax does not apply to any of their operations as a matter of statutory interpretation because the statute taxes on the basis of fish obtained for freezing.

The case of one appellant, Northern Reefer Company, involves the additional question of the validity of a lien for

the taxes asserted by the Territory against the vessel Reefer II. This appellant was an innocent purchaser of the vessel after it had engaged in the operations for which tax is now claimed. The trial court upheld the lien.

I.

Appellants contend that the tax imposed on freezer ships is void because: (1) it is part of a tax system which discriminates against burdens and interstate commerce in violation of the commerce clause, Article I, §8 of the Constitution; (2) the separate tax classification of freezer ships and other floating cold storages is arbitrary and unreasonable, and is therefore in conflict with the equal protection clause of the 14th Amendment, the privileges and immunities clauses of Article IV, §2, and the 14th Amendment, the due process clauses of the 5th and 14th Amendments, and the White Act, 43 Stat. 464 (1924), 48 U.S.C. §222; and (3) the tax is a modification of the United States fish laws and therefore prohibited to the Alaskan legislature by the Organic Act of Alaska, §3, 37 Stat. 512 (1912), 48 U.S.C. §24.

The Alaskan statutes provide for these relevant taxes: A tax on salmon canneries, both shore-based and floating, of 6% of the value of the raw fish purchased or otherwise obtained for canning during the year;[1] and 1% of the

[1] Chapter 82, §1(a), Session Laws of Alaska, 1949, as amended by Chapter 113, §1, Session Laws of Alaska, 1951, reading as follows:

(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

value of the raw fish diverted for other purposes;[2] a tax on freezer ships and other floating cold storages of 4% of the value of the raw fish bought or otherwise obtained for processing through freezing;[3] and a tax on shore-based cold storages and all other fish processors, except salmon canneries and others not here relevant, of 1% of the value of the raw fish bought or otherwise obtained for processing through freezing, salting, or other method.[4] Although the

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[2] Chapter 82, § 1(a)(1), Session Laws of Alaska, 1949, reading as follows:

(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

[3] Chapter 97, § 1, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951, reading as follows:

(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resources bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished, etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

[4] Chapter 97, § 1(a), Session Laws of Alaska 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951, reading as follows:

(a) Shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the

value of the raw fish is not determined in the same way under these three statutes, little testimony was offered on this point, and none of it indicated that the relative amounts of tax were significantly affected by this difference. We shall therefore treat the statutory percentages as reflecting the relative impact of the taxes.

Appellants claim that the effect of the tax system is to hamper, burden and discourage the interstate movement of salmon prior to final processing. They point to these facts: The shore-based cold storages are taxed at 1% for freezing fish; the Alaskan canneries are taxed 1% for fish which they do not can and are not taxed for freezing fish which they later can; the appellants are taxed 4% for freezing fish. Even assuming that the tax on freezer ships is one affecting interstate commerce and therefore subject to the limitation of the commerce clause,[5] in our view this portion of the Alaskan tax system as applied to appellants does not discriminate against or unduly hamper the interstate movement of salmon prior to final processing. The shore-based cold storages freeze fish for the fresh-frozen consumer market; they are not in competition with appellants, who can all their fish. Fish frozen by a cannery but not canned are likewise not in competition with appellants' product. We see no significance in the fact that the Alaskan canneries do not pay a tax at the freezing stage on fish which they later can. This is only an illusory benefit, for such fish will be taxed at the 6% rate before they enter the market to compete with appellants' product. The same is

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processor or offsets to the cash value for gear furnished, etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

[5] We do not decide the contested issue of whether the operation of the freezer ships in obtaining and freezing fish in Alaskan waters is in interstate commerce or a purely local operation. Compare *Oliver Iron Co.* v. *Lord*, 1923, 262 U.S. 172.

true of the fact that the Territory does not collect the 1% freezing tax from shore-based cold storages on fish which are later canned in Alaska, for these fish are likewise subject to the 6% canning tax before they enter the canned salmon market.

Appellants have urged us to consider three cases as principal support for their contention that the freezer ship tax is a burden on commerce: *Foster-Fountain Packing Co.* v. *Haydel*, 1928, 278 U.S. 1; *Toomer* v. *Witsell*, 1948, 334 U.S. 385; and *Memphis Steam Laundry* v. *Stone*, 1952, 342 U.S. 389. None of these cases are in point for in each case the court found that the statute in question was designed to and actually did operate in a discriminatory manner to discourage use of out-of-state competition and to encourage local industry. No such contention is made here.[6] We conclude that the tax as here applied does not discriminate against or burden interstate commerce so as to violate the commerce clause.

We also reject appellants' next contention that the separate tax classification of freezer ships is arbitrary and unreasonable. Freezer ships are different from the shore-based cold storages in that the former obtain their fish for canning while the latter obtain theirs for the fresh frozen consumer market. The legislature is free to differentiate between different industries, taxing one more heavily

[6] The statutes declared invalid were:

(a) A Louisiana statute prohibiting export of shrimp from the state before the heads and shells had been removed. *Foster-Fountain Packing Co.* v. *Haydel*, supra;

(b) A South Carolina statute requiring fish caught within the state to be unloaded, packed and stamped before being shipped out of the state. *Toomer* v. *Witsell*, supra;

(c) A Mississippi statute imposing a privilege tax on laundries not licensed in the state which solicited business therein. *Memphis Steam Laundry* v. *Stone*, supra.

than another.[7] Therefore it may tax the canned salmon industry more heavily than the fresh-frozen salmon industry.

It is equally clear that the freezer ships do compete in the same industry as the Alaska canneries. Unlike these competitors, they do not can their fish in Alaska. However, this difference is reflected in the substantially lower tax required of them as contrasted with that paid by the Alaskan canneries. Appellants have contended that certain ships which catch Alaskan salmon and preserve it by icing before carrying it elsewhere for canning, are not taxed at all. We have been unable to find any substantial evidence in the record that such ships are operating, and therefore reject this contention as not sustained by proof.

It is unnecessary to consider the applicability of the many cases bearing on the question whether arbitrary or unreasonable tax classifications violate the Constitution, since it appears that no arbitrary or unreasonable classification is present in this case. *State Board of Tax Commissioners* v. *Jackson*, 1931, 283 U.S. 527, 537.

This conclusion of fact likewise answers the argument of appellants that the freezer ship tax violates the White Act, 43 Stat. 464 (1924), 48 U.S.C. §222, by denying them as United States citizens the right to fish in areas where fishing is permitted by the Secretary of the Interior. Appellants do not contend that this Act grants them immunity from taxation by the Territory in the exercise of their fishing rights. Their argument is that the tax is discriminatory and therefore impairs their right to fish on a basis of substantial equality as guaranteed by the White Act. Since we have found that the freezer ship tax as here applied is

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[7] *Quong Wing* v. *Kirkendall*, 1912, 223 U.S. 59; *Alaska Fish Co* v. *Smith*, 1921, 255 U.S. 44; cf. *State Board of Tax Commissioners* v. *Jackson*, 1931, 283 U.S. 527.

not unreasonable, arbitrary or discriminatory, we find that appellants are not prevented from exercising their fishing rights on a basis of substantial equality.[8]

Appellants next contend that the freezer ship tax is an attempt to modify the fish laws of the United States in violation of the Organic Act of Alaska, §3, 37 Stat. 512 (1912), 48 U.S.C. §24. That Act denies to the territorial legislature authority to alter, amend, modify or repeal, among others, the fish laws of the United States applicable to Alaska, except that "[t]his provision shall not operate to prevent the [Alaskan] legislature from imposing other and additional taxes or licenses." Appellants' contention is without merit. This is not a case in which fish regulation is attempted through the imposition of a prohibitive license tax on an unwanted activity.[9] The imposition by Alaska of reasonable taxes is clearly permitted by Congress.[10] We therefore find this tax to be valid.

II.

Appellants contend that the freezer ship tax is imposed on the operation of freezer ships and not on the act of taking fish. They conclude that they should be taxed only on those fish taken on board the freezer ships while they were actually within Alaskan waters. The trial court found that the taxable event was the taking of the fish from the waters of Alaska. The court therefore directed that the tax be paid on all fish obtained from Alaskan waters. This included fish obtained by company-operated catcher boats while their mother freezer ship was outside

[8] This is not a case of a revenue act so harsh that it amounts to a prohibition against fishing.' Compare *P. E. Harris & Co.* v. *Mullaney*, Alaska 1949, 87 F. Supp. 248.

[9] Compare *P. E. Harris & Co.* v. *Mullaney*, Alaska 1949, 87 F. Supp. 248.

[10] *Pacific American Fisheries* v. *Alaska*, 1925, 269 U.S. 269, 277; *Alaska Fish Co.* v. *Smith*, 1921, 255 U.S. 44.

such waters as well as fish purchased by the freezer ship outside Alaskan waters from independent catchers. The court reasoned that a contrary rule would permit evasion of Alaskan tax laws by the subterfuge of anchoring freezer ships outside Alaskan waters while those waters were being fished on behalf of the freezer ships by catcher boats.

We agree with the court below that freezer ships outside Alaskan waters which operate catcher boats within such waters must accept tax responsibility for the fish so obtained. Obtaining fish is an integral part of the operation of the freezer ship. The catcher boats operated by the freezer ship itself are but an extension of that ship's operations. If the extension operates within Alaskan waters, the freezer ship itself is operating within such waters and is subject to Alaska's tax jurisdiction.

However, we cannot agree that the freezer ships must pay Alaskan taxes on fish obtained within Alaskan waters by independent catcher boats but purchased by the freezer ships outside those waters. By this device freezer ship operators may reduce their liability for Alaskan taxes. However, Alaska cannot extend its taxes to nonresidents beyond its territorial jurisdiction in order to prevent such tax avoidance. The Territory is free to impose such taxes as it sees fit, within the limits set by the Constitution and federal legislation. By the same token, the freezer ship operators are free to arrange their operations so that the impact of such taxes upon them is minimized. Remaining outside the Territory is one method by which a nonresident may accomplish this purpose.

As to the catcher boats operated under contractual arrangements with appellants, the record does not reveal sufficient information about the nature of such arrangements to enable us to decide whether they should be regarded as extensions of the freezer ships. This question will be remanded for determination by the trial court.

The territorial limits of Alaska are defined by statute as those of the territory ceded by Russia to the United States by the treaty of March 30, 1867, 15 Stat. 539. Organic Act of Alaska, §1, 37 Stat. 512, 48 U.S.C. §21. That treaty placed the western boundary of the territory at a line running from the Bering Straits to the most western Aleutian island, thereby taking in most of the Bering Sea, including Bristol Bay. The United States at one time asserted regulatory power over seal fishing throughout this portion of the Bering Sea. An international dispute resulted, which was submitted to arbitration by the United States and Great Britain.[11] The arbitrators held that United States jurisdiction to regulate sealing in the Bering Sea did not extend beyond the ordinary limit of territorial waters, the three-mile limit.[12]

Since the United States had agreed in advance to abide by the award of the arbitrators,[13] this decision was held to result in a withdrawal to the ordinary three-mile limit of exclusive United States jurisdiction over waters of the Bering Sea. *La Ninfa*, 9 Cir. 1896, 75 F. 513. Because Bristol Bay is an arm of the Bering Sea, forming the southeast corner thereof, the three-mile limit for United States jurisdiction in the Bering Sea applies to much of Bristol Bay as well.

We do not agree with the Territory's contention that the freezer ship operators are liable for taxes on fish obtained outside the three-mile zone in Bristol Bay because Alaskan jurisdiction extends throughout the Bristol Bay fishing area as defined by the United States Fish and Wildlife Service.

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[11] Arbitration was agreed upon in a convention between the United States and Great Britain, concluded February 29, 1892, 27 Stat. 947.

[12] 27 Am. Law Rev. 703 (1893).

[13] Convention between the Governments of the United States and Her Britannic Majesty, February 29, 1892, 27 Stat. 947, 951.

Bristol Bay is a portion of the Bering Sea which lies in the angle formed by the Alaskan Peninsula and the mainland to the north. Cape Newenham can be regarded as its northern headland, but its southern boundary, the Alaskan Peninsula, extends out into the Pacific Ocean much further than Cape Newenham and provides no clearly defined southern headland. The Fish and Wildlife Service defines the Bristol Bay area as follows:

> "The Bristol Bay area is hereby defined to include all territorial coastal and tributary waters of Alaska from Cape Newenham to a point on the coast 3 statute miles south of Cape Menshikof." 50 Code Fed. Reg. ¶104.1.

The distance between Cape Newenham and a point 3 miles south of Cape Menshikof is approximately 172 miles. The shortest distance between Cape Newenham and the Alaskan Peninsula is 165.5 miles and extends to a point 13.5 miles northeast of Cape Seniavin. It has been asserted that Bristol Bay includes the entire area between Cape Newenham and Cape Sarichef, a distance of approximately 290 miles. Bristol Bay is so large and so ill defined by geographical features that it is better described as a corner of the Bering Sea than as a separate body of water.

The Territory contends that Congress and the United States Fish and Wildlife Service have asserted United States jurisdiction beyond the three-mile limit in Bristol Bay. Congress by statute excludes non-United States citizens and non-residents of the "area embracing Bristol Bay and the arms and tributaries thereof" from stake-net and set-net fishing within the area. 43 Stat. 464 (1924) as amended, 48 U.S.C. §222a. As we have pointed out, the United States Fish and Wildlife Service has a regulation which defines the Bristol Bay fishing area.

The determination of territorial jurisdiction is a political and not a judicial prerogative. Courts are bound to accept

assertions of territorial jurisdiction made by Congress or the federal executive, acting within their authority.[14] However, we have carefully considered both the statute and the fishing area designation in the light of the arbitration award in the seal fishing dispute between the United States and Great Britain and the decision of this court in La Ninfa, supra, and are satisfied that neither constitutes an assertion of jurisdiction binding upon us.

What we have said concerning jurisdiction over Bristol Bay beyond the three-mile limit does not apply to Egegik Bay, Kvichak Bay and Nushagak Bay, all of which are regarded as arms and tributaries of Bristol Bay. The width of the entrance of Egegik Bay is less than six miles,[15] and although the width of Kvichak Bay and Nushagak Bay exceed ten miles at their entrances,[16] their locations and history place them within Alaskan jurisdiction.

In *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*, [1877] L.R. 2 App.Cas. 394, the Privy Council in discussing whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was

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[14] *In re Cooper*, 1892, 143 U.S. 472, 503; *Jones* v. *United States*, 1890, 137 U.S. 202; *La Ninfa*, 9 Cir. 1896, 75 F. 513.

[15] Bays six miles or less at the entrance are automatically included within the territorial limits of a nation by virtue of drawing a three-mile belt from each headland. Eg. *Manchester* v. *Massachusetts*, 1891, 139 U.S. 240, 257.

[16] In case of an indentation up to ten miles wide at the mouth, the lines across the entrance would mark the limits of inland waters and the marginal sea would extend three miles seaward of that line. In the case of an indentation wider than ten miles, the line shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles. Jessup, p. 356; A. L. Shalowitz, Legal-Technical Aspects of the Submerged Lands Cases; (Department of Commerce-U.S. Coast and Geodetic Survey 1954) pages 26-27.

part of the territory of Newfoundland and within the jurisdiction of its legislature, stated:

> "It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory . . ."

In considering the weight to be given historical claims, the court stated:

> ". . . the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

The United States and Alaska have exercised jurisdiction over these three smaller bays, and the claims of jurisdiction have not been challenged by any foreign government. In a geographical sense, they belong to Alaska, since they are part and parcel of it. In considering bays with headlands more than ten miles in width, the courts usually attach great importance to the historical claims and assertions of jurisdiction over a particular bay by the littoral sovereign as well as to whether there is a definite geographical relationship between the bay and such sovereign.[17]

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[17] *People* v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941 (1939); *Cunard Steamship Co.* v. *Mellon*, 1923, 262 U.S. 100. On the role of the courts in treating the problem of jurisdiction over bays, see Jessup, Law of Territorial Waters and Maritime Jurisdiction p. 355 et

The record before us does not specify the areas in which the fishing was done in Bristol Bay during the red salmon season. The statistics concerning the volume and money value of the catch by vessel relates to fishing north of Dixon Entrance (54° 40′ North Latitude). We have already found that much of this area is not within the jurisdiction of Alaska. However, there was testimony that the Arctic Maid was anchored between Egegik and the Nakinek River, and particularly between Middle Bluff and Red Bluff, when it received all or most of its fish from catcher boats operating within the three-mile limit during the Bristol Bay red salmon season. The bays within and adjacent to this area are all within the jurisdiction of Alaska.

In view of the unsatisfactory record before us as to the precise location in Bristol Bay and its tributaries in which the freezer ships operated and the absence of information as to the volume and value of the catches during such periods, these facts must also be determined by the trial court upon the remand of this case.

III.

Appellants contend that the statute, by its own terms, does not apply to their operations. The statute taxes on

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seq. (1927), and I Hyde, International Law §§ 146 et seq. (1945). Professor Hyde, at Page 473, states:

> "The coast of Alaska is indented by certain bays of broad dimensions which by reason of their relation to the land appear to belong in a geographical sense to the sovereign thereof."

Included among such bays are Bristol Bay inside of a line drawn from Igagik (also spelled Egegik) to Protection Point. He states:

> "They are water areas which, regardless of the distance between headlands, it is believed that the United States may formally claim to be its own without violating any requirement of international law."

The line of which he speaks is immediately adjacent to Nushagak Bay and Egegik Bay, and at most is just a few miles from the entrance of Kvichak Bay.

the basis of the value of the raw fish resource "bought or otherwise obtained for processing through freezing." [18] Appellants assert that although they froze all their fish, this was not the purpose for which the fish were obtained. They were all obtained for processing through canning, and the freezing was merely a temporary measure to preserve the fish until they could be brought to the canneries at Puget Sound.

We agree with the court below that the freezer ship tax applies to appellants. It is apparent from both the preamble[19] and the body of the statute that the legislature intended to tax freezer ships. During the years in question and the time the statute was enacted, the only freezer ships which operated in Alaskan waters were those which obtained their fish for canning. There can be little doubt that the legislature intended to cover operations like those of the appellants when it enacted the freezer ship tax. While the statute is not a model of clarity, we think it clear and broad enough to accomplish this legislative purpose. We therefore reject appellants' narrow construction which would result in frustrating that purpose.

Appellants assert that the Alaska Department of Taxation has itself accepted their interpretation of the phrase "bought or otherwise obtained for processing through freezing." This claim is based on testimony of a Department of Taxation enforcement officer that shore-based cold storages for freezing fish which are later canned in Alaska are not taxed even though a somewhat similar phrase prescribes the tax liability of shore-based cold

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[18] Chapter 97, § 1(b), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951. The text of the section is set out in footnote 3 supra.

[19] Chapter 116—An Act Amending Section 1 of Chapter 97, Session Laws of Alaska, 1949 imposing a license tax on freezer ships and other floating cold storages and declaring an emergency.

storages.[20] The Department does collect the six per cent canning tax on such fish. Such testimony, even if it represented the official views of the Department of Taxation, does not support appellants' interpretation that freezing of salmon which are ultimately canned is not taxable under a statute which taxes fish obtained "for processing through freezing." A more plausible explanation is that the Department has construed the Alaskan statutes to require imposition of only the highest applicable Alaskan processing tax on fish processed by more than one taxable method. In any event, we believe that the freezer ship tax is applicable to the appellants.

IV.

The final question concerns the validity of the lien asserted by the Territory against the freezer ship Reefer II, presently owned by appellant Northern Reefer Company. The lien was claimed for taxes due as a result of the operations of the Reefer II by the Grimes Packing Company, its then owner during 1952. Under the statute, an initial fee of $25.00 is required before a ship is operated during any year, with payment of the total fees owing as a result of the year's operation to be made by January 15th of the following year. The Grimes Packing Company paid neither the initial nor final fees. Subsequent to January 31, 1953, the ship was sold to Northern Reefer Company by the estate of O. L. Grimes, sole proprietor of the Grimes Packing Company, for value and without notice of any lien on the vessel. The Alaska Tax Commissioner was unaware of the death of Grimes and the transfer of the vessel. He, therefore, made no claim against Grimes' estate for the taxes now alleged to be due.

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[20] Chapter 97, § 1(a), Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951. The text of the section is set out at footnote 4 supra.

The lien against the Reefer II is claimed under the following provision:

> "Liens. All taxes levied or provided or accruing under the provisions of this Act, and the penalties and interest thereon are hereby declared to be a lien prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the business . . . ." [21]

The appellant contends that the lien under this statute does not actually attach to the property until the tax is assessed by the Tax Commissioner, and since the tax was not assessed until after appellant's innocent purchase of the vessel, the asserted lien is invalid.

Appellant failed to raise this contention at the trial stage, and appellee urges that we refuse to consider it now. Since this case must be remanded to the District Court to determine other issues, we remand it also for a determination of the validity of the lien in the light of appellant's new contention.

Conclusion

We hold the freezer ship tax to be valid as to all fish obtained by appellants' freezer ships within three miles of Alaskan shores and within such other Alaskan waters as are within the jurisdiction of the United States. Bristol Bay, or the greater portion thereof beyond the three-mile zone, is not within the jurisdiction of the United States, but Egegik Bay, Kvichak Bay and Nushagak Bay, which are

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[21] Chapter 82, § 4(h), Session Laws of Alaska, 1949, made applicable by Chapter 97, § 4, Session Laws of Alaska, 1949, as amended by Chapter 116, § 1, Session Laws of Alaska, 1951.

tributaries of Bristol Bay, are all within the jurisdiction of the United States.

The tax on fish obtained within Alaskan jurisdiction by catcher boats operated by appellants is valid, but no tax may be levied upon fish obtained by freezer ships outside Alaskan jurisdiction from independent fishermen even though the independent fishermen caught the fish in waters within Alaskan jurisdiction.

The record before us as to the periods in which the freezer ships operated within Alaskan jurisdiction and the volume and value of the catches during such periods is insufficient to enable us to determine the amount of taxes which are attributable to such operations. The case is therefore remanded to the District Court to make that determination.

This record is also insufficient on the status of the contract catcher boats. The trial court is directed to determine whether the operators of these catcher boats were independent contractors or employees of appellants.

The judgment is vacated and the case remanded for a redetermination of the tax in accordance with this opinion and for a re-examination of the validity of the tax lien asserted against the Reefer II.

(Endorsed:) Opinion. Filed Mar. 16, 1959.

Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,284

PACIFIC REEFER and PACIFIC REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,285

PACIFIC QUEEN and PACIFIC QUEEN FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,286

ALASKA REEFER and ALASKA REEFER FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,287

NORTH STAR and NORTH STAR FISHERIES, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

No. 15,288

NORTHERN REEFER COMPANY, GRIMES PACKING COMPANY and REEFER II, *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

Mar. 23, 1960

Appeals from the United States District Court for the District of Alaska, First Division

Before: Chambers, Chief Judge, and Stephens, Pope, Barnes, Hamley, Hamlin, Jertberg, Merrill, and Koelsch, Circuit Judges.

HAMLEY, Circuit Judge:

These actions were brought by the Territory of Alaska to recover unpaid license taxes incurred in the operation of freezer ships during the years 1951 through 1954. The partnerships and corporation which were named defendants denied liability. Four of them counterclaimed to recover taxes which they had paid.[1] The actions were consolidated for trial.

Judgment was entered for Alaska and against each defendant, the total award being $116,731.53. In support of this judgment the trial court filed an opinion containing

[1] The defendants are as named in the title of this action. The counterclaims were filed by Arctic Maid, Pacific Queen, Alaska Reefer, and North Star.

findings of fact and conclusions of law in addition to a discussion of the issues. Territory of Alaska v. The Arctic Maid, 140 F. Supp. 190. In an unreported supplemental opinion thereafter filed there is further discussion of some of the issues.

Defendants have joined in this appeal. They raise a number of questions relating to the construction of the taxing statute, the territorial jurisdiction of Alaska over the business activity in question, and the validity of the tax, as applied, under certain constitutional and statutory provisions. Two of the defendants, Northern Reefer Company and Grimes Packing Company, present an additional question relating to the enforceability of a tax lien asserted against the freezer ship Reefer II.

The appeal was originally argued before a court consisting of two circuit judges and one district judge. After an opinion had been filed by the court as so constituted a rehearing en banc was granted. The previously entered opinion is hereby withdrawn and this opinion by the court en banc is entered in substitution therefor.

The facts necessary to be considered are not in dispute. Appellant Arctic Maid is a Washington corporation not qualified to do business in Alaska. The remaining appellants are partnerships, all members of which are residents of either the State of Washington or the State of California, and all are citizens of the United States. None of the copartners resides in Alaska. All of the appellants operate canneries located on Puget Sound in the State of Washington. In order to obtain fish for their respective canneries they each send freezer ships to the waters adjacent to Alaska each year during the salmon season.

The freezer ships are vessels equipped with refrigeration and storage facilities for the freezing, storage, and transportation of fish. They are also equipped to provide transportation facilities for fishermen, and food and

quarters for fishermen during the Alaska fishing season. In addition these freezer ships provide means for transporting "catcher" boats from Puget Sound to Alaskan fishing waters and back again at the end of the fishing season.

The fish are caught from the catcher boats, and are then transferred to the freezer ships. These catcher boats are of a general type commonly known as "Bristol Bay gillnetters." They are gas-powered vessels about thirty to thirty-two feet in length.

In most instances these gillnetters are owned by appellants and are transported from and returned to Puget Sound aboard the freezer ships. In some cases gillnetters owned by appellants are not transported to and from Puget Sound, but are stored ashore in the Bristol Bay area. In other instances appellants have contracted with others owning gillnetters to catch fish for the freezer ships during the salmon season.

The gillnetters are manned by fishermen—two to each boat—employed each season by appellants under the terms of the current Bristol Bay agreement between the salmon industry and the Alaska Fishermen's Union.[2] In addition to obtaining fish through the use of gillnetters owned by or operated under contract with appellants, fish are also purchased from independent fishermen and taken aboard the freezer ships.

The freezer ships are utilized primarily in connection with the Bristol Bay red salmon season. They anchor seaward of a line drawn parallel to and at a distance of

[2] In broad outline the terms of employment of the fishermen provide that the defendants supply the gillnetters and all gear, pay the current seasonal price for the salmon caught and delivered to the freezer ships, provide food and quarters aboard the "mother ship," pay "run money" in the amount of $234 per man, furnish air transportation in one direction if desired by the fisherman, and provide fuel for the operation of the gillnetter.

three miles from mean low tide mark on the shore of Bristol Bay and serve as a base for the operations of the gillnetters.

The gillnetters leave their respective freezer ships at the beginning of each open period during the fishing season and proceed to the fishing areas inshore. They traverse this inshore water, searching for fish, and return periodically to their freezer ships. The fish which have been caught are then transferred to the freezer ships by means of a net suspended from a boom. As the fishermen throw the fish into the net the fish are tallied by the crew of the freezer ship. The fishermen's pay is based upon the number of fish so tallied.

During some of the years here in question some of the appellants operated their freezer ships at other times or in other areas than during the Bristol Bay red salmon season. For example, freezer ships were sometimes utilized in the Bristol Bay king salmon season, or in the Kodiak, Cook Inlet, or Southeastern Alaska areas. During these operations, as distinguished from the Bristol Bay red salmon season, the freezer ships were operated at points closer to shore than three miles and obtained fish from catcher boats while so positioned.

When fish are taken aboard the freezer ships from the gillnetters owned or operated under contract by appellants, or after purchase from independent fishermen, they are dumped into quick-freezing brine tanks. The freezing begins immediately and continues over a period of ten to twelve hours. During this time the brine in the tank is constantly changed and circulated. At the end of ten to twelve hours the temperature of the fish has been lowered to twelve to fifteen degrees and they are fully frozen.

Traps in the bottom of the brine tanks are then opened and by means of a chute the fish are directed into the refrigerated hold where they are stored until discharged

at destination on Puget Sound. The brine tanks themselves are sometimes used for the storage of fish.[3]

At the conclusion of the operations in waters adjacent to Alaska appellants take on board the gillnetters which had been transported from Puget Sound on the freezer ships. Appellants then return these freezer ships to Puget Sound and discharge the frozen fish at their respective canneries. During the years in question all but five hundred pound of the frozen fish so transported to Puget Sound were canned there by appellants.

The Alaska license tax here in question has its genesis in Session Laws of Alaska 1949, chapter 97. Under this 1949 statute a one-per-cent annual license tax was imposed upon persons, firms, or corporations prosecuting certain lines of business. The specified lines of business were "cold storage and other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: . . ." It was provided that the annual tax would be equal to one per cent of the value of the fish ". . . bought or otherwise obtained for processing through freezing, salting or other method."

It will be observed that in so far as cold storages are concerned no distinction was drawn in the 1949 statute between shore-based plants and freezer ships or other floating cold storages. All were to be taxed at the rate of one per cent of the value of the raw fish.

Such a distinction was drawn in 1951, however, when the territorial legislature enacted chapter 116, amending chapter 97, Sess. Laws Alaska 1949. In the 1951 enactment the lines of business to be taxed were divided into two

[3] During the 1951 season the freezing method employed aboard the vessel Pacific Queen was the so-called "air-blast" method. Under this method the fish are placed in racks and set into a freezing compartment where they are subjected to blasts of air at a sub-freezing temperature until fully frozen.

groups. The first, consisting of "shore based cold storages and all other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: . . . ," were taxed at the 1949 rate of one per cent. The second group, consisting of "freezer ships and other floating cold storages," were taxed at the rate of four per cent.[4]

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[4] Sess. Laws Alaska 1951, chapter 116, reads as follows:

"Section 1. Section 1 of Chapter 97, Session Laws of Alaska 1949, is hereby amended to read as follows:

"Section 1. BUSINESS IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

"(a) Shore based cold storages and all other fish processors except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

"(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned

In 1949 Alaska also imposed a four-per-cent license tax on salmon canneries, both shore-based and floating (Sess. Laws Alaska 1949, ch. 82). This tax was raised to six per cent in 1951. Sess. Laws Alaska 1951, ch. 113, Alaska Comp. Laws, Cum. Supp. 1958, § 35-1-91.[5] Also in 1949 Alaska imposed a five-dollar annual license fee for resident commercial fishermen who take fish from the fishery resources of Alaska, and a fifty-dollar annual license fee on nonresident commercial fishermen engaged in the same activity. Sess. Laws Alaska 1949, ch. 66. This tax was thereafter declared invalid. Anderson v. Mullaney, 9 Cir., 191 F. 2d 123, affirmed sub nom. Mullaney v. Anderson, 342 U. S. 415.

One of the contentions made by appellants on this appeal is that the tax in question, as applied, imposes an undue burden on and discriminates against interstate commerce, and is an attempted regulation of interstate commerce, all in violation of Article I, section 8, of the Constitution. If this contention is well founded, it is dispositive of the entire case, since the tax would then be wholly invalid and unenforceable. We therefore proceed at once to a consideration of this question.

In asserting that the freezer-ship tax here in question is invalid under the Commerce Clause, appellants advance two arguments. The first is that the activity sought to be taxed is an inseparable part of interstate commerce and so is not subject to any state or territorial privilege tax.

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which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement.

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval."

[5] This tax was computed on a somewhat different basis than the tax on shore-based cold storages and freezer ships and other floating cold storages, but the difference is immaterial for present purposes.

The second is that the statute, as enacted and administered, discriminates against the interstate transportation of salmon caught in Alaskan waters for canning outside of Alaska and in favor of the canning of such salmon within Alaska.

In dealing with either of these arguments it is first necessary to determine what business activity was intended to be taxed. Part of the activity of freezer ships, including at the very least the moving of the vessels to and from Bristol Bay and Puget Sound, occurs beyond the territorial jurisdiction of Alaska. If the tax is intended to include this extraterritorial activity of freezer ships, the tax is invalid—not under the Commerce Clause, but under the Due Process Clauses of the Fifth and Fourteenth Amendments.[6]

But, despite the broad language of chapter 116 in taxing the prosecution of the "line of business" of freezer ships, we are unwilling to believe that the legislature intended to impose such a clearly unconstitutional tax. Where a statute is reasonably susceptible of two constructions, that construction will ordinarily be accepted which avoids invalidation on a constitutional ground.[7]

Under all of the facts it is reasonable to assume that the freezer-ship activities which the territorial legislature had in mind and intended to tax did not include any which occurred while the freezer ships were beyond territorial waters.

A serious question is raised on this appeal as to whether the freezer ships while at anchor beyond the three-mile limit in Bristol Bay were in territorial waters. For the purpose of considering the Commerce Clause question we

[6] Miller Bros. Company v. Maryland, 347 U.S. 340, 342; Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83; International Paper Co. v. Massachusetts, 246 U.S. 135, 141.

[7] United States v. Witkovich, 353 U.S. 194, 201; Singer Sewing Machine Co. v. Brickell, 233 U.S. 304.

will assume that they were. It follows under this assumption that all activities of the "line of business" of freezer ships, carried on while the freezer ships were at anchor, were subject to Alaskan tax jurisdiction unless precluded by the Commerce Clause.

The question remains, however whether chapter 116 was intended as a tax on all activity while the freezer ships were at anchor. The prime activity was the freezing and cold storage of fish preparatory to transporting the fish in interstate commerce for canning elsewhere. But, as an integrated part of the business of operating freezer ships, catcher boats owned or under contract to appellants were utilized in the catching of fish which were then taken aboard the freezer ships.

The trial court held that chapter 116 was not intended as a tax upon the activity of the freezer ships in freezing fish and maintaining the fish in cold storage. Rather, that court held, the only activity of freezer ships intended to be taxed under that chapter was the one of taking fish in territorial waters through utilization of catcher boats owned by or under contract to appellants.

In our opinion, however, the catching of fish is not the tax incident or a part of the tax incident contemplated by §1(b) of chapter 116, taxing freezer ships. As therein provided, the tax is four per cent of the value of raw fish "bought or otherwise obtained for processing through freezing." The tax therefore applies whether or not the fish are caught by gillnetters owned by or under contract to appellants. The emphasis in the quoted statutory words is on the purpose of acquisition—not the manner of acquisition. The purpose which gives rise to the tax is "processing through freezing."

Thus it is the freezer-ship activity of processing through freezing which is taxed. The value of raw fish bought or otherwise obtained is referred to only in specifying the

method of computing the tax. Likewise, under section 1(a) of chapter 116 the shore-based cold-storage activity which is taxed is that of "processing through freezing," whether the fish are acquired by purchase or otherwise.[8] Similarly, under Sess. Laws Alaska 1951, chapter 113, the salmon cannery activity which is taxed is that of "canning," whether the raw fish are "purchased or otherwise obtained."[9]

In concluding that the only activity here being taxed is the taking of fish, the trial court likened Sess. Laws Alaska 1951, chapter 116, to the taxing statutes which were upheld in Toomer v. Witsell, 334 U. S. 385, and Oliver Iron Mining Co. v. Lord, 262 U. S. 172.

In Toomer nonresident owners of commercial shrimp trawlers resisted a South Carolina tax of one-eighth cent a pound on green, or raw, shrimp taken within three miles of the coast of that state.[10] In holding that the tax was

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[8] The testimony is undisputed that shore-based cold storages do not use catcher boats of their own. It also appears probable, though the evidence is not explicit on this, that much of the troll-caught fish used by shore-based cold storages are caught on the high seas. Hence, if the license tax on shore-based cold storages, which (except for the rate of tax) is to be computed in the same manner as for freezer ships, is deemed to be a tax on the catching of fish, Alaska is taxing shore-based cold storages on an extraterritorial activity of independent fishermen.

[9] Should it be held that the activity taxed under these three provisions is or includes the catching of fish, a grave due process question would be presented. This arises from the fact that the territorial legislature would then be chargeable with placing in one class and taxing the catching of fish by the use of boats owned by or operated for freezer ships, while placing in another class and not taxing the catching of fish by independent fishermen.

[10] The South Carolina statute provided:

"The following fisheries' tax is hereby imposed upon all fish or fisheries products taken or canned, shucked or shipped for market, to-wit . . . on each pound of green shrimp, one-eighth of one cent. . . ."

not invalid under the Commerce Clause, the court stated that the taxable event was the taking of shrimp.

Since the only activity involved in Toomer was that of operating commercial shrimp trawlers, the taxable event was necessarily the catching of shrimp. Here, however, the activity named in the taxing statute is that of operating freezer ships, the prime functio of which is the freezing of fish. The holding in Toomer, that the taxable event there in question was the taking of fish, therefore provides no guidance which is helpful here.

We reach the same conclusion with respect to Oliver Iron Mining Co. v. Lord, supra, also relied upon by the trial court. In that case a six-per-cent occupation tax was levied upon "every person engaged in the business of mining or producing iron ore or other ores in this state . . . ." It was provided that the tax would be equal to six per cent of the valuation of the ore mined or produced. In upholding the tax against a Commerce Clause challenge the court stated that the tax was levied on the business of mining ore. Since the only activity there in question was the mining of ore, the court's conclusion as to the taxable event necessarily followed.

We hold that the only tax incident defined in chapter 116 is the freezing and cold storage of fish aboard freezer ships while the ships are at anchor in what we, for present purposes, assume to be territorial waters.

As before noted, it is one of appellants' contentions under their Commerce Clause point that this activity is an inseparable part of interstate commerce and so is not subject to any privilege tax, whether or not discriminatory.

The basic premise of this argument is established law. A state may not lay a tax on the "privilege" of engaging

in interstate commerce.[11] Where this is the nature of the tax the Commerce Clause forbids its imposition, whether or not discriminatory and regardless of the amount of the tax or the method of computation.[12] Likewise, the fact that the taxpayer has received benefits through local conservation measures is immaterial. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 163-164.

It is to be noted that the cases draw a clear distinction between the privilege taxes and state exactions taking the form of compensation for the use of highways, collections in lieu of an ad valorem property tax, inspection fees, taxes on sales or use, excise or privilege taxes on activities before interstate commerce begins and after it ends, or fairly apportioned net income taxes. All of the latter may be the subject of nondiscriminatory state or local impositions.[13] But the right to engage in interstate commerce is not a privilege conferred by state or local government, and may not be taxed as such.

The critical question, then, is whether the activity of freezing and cold storing fish, engaged in by freezer ships while lying at anchor in territorial waters preparatory to transporting such fish to the State of Washington for canning, is an inseparable part of interstate commerce. If so, any territorial privilege tax thereon is forbidden by the Commerce Clause.

The freezing and cold-storage activity in question is a "local" activity in the sense that under the assumptions

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[11] Northwestern States' Portland Cement Co. v. Minnesota, 358 U.S. 450, 458; Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 610; Joseph v. Carter & Weekes Co., 330 U.S. 422, 433; McGoldrick v. Berwind-White Co., 309 U.S. 33, 48.

[12] Spector Motor Service, Inc. v. O'Connor, supra, p. 607; Joseph v. Carter & Weekes Co., supra, p. 433.

[13] Northwestern Cement Co. v. Minnesota, supra, pp. 458-459; Spector Motor Service, Inc. v. O'Connor, supra, p. 607; McGoldrick v. Berwind-White Co., supra, p. 47.

here made it takes place within Alaskan territorial jurisdiction. This is true of most interstate commerce activity. The individual phases thereof take place within the boundaries of one state or another, except, as in this case, where part of the transportation is on the high seas. But if such local activity is of a kind which cannot be separated from the interstate process, the flow of commerce, it must be regarded as an integral part of interstate commerce. Michigan-Wisconsin Pipe Line Co. v. Calvert, supra, p. 166.

In determining whether the activity here in question can be separated from the interstate process, the flow of commerce, the case of Joseph v. Carter & Weekes Co., supra, provides helpful guidance. In that case a nondiscriminatory municipal excise tax on the gross receipts of a stevedoring company engaged in loading and unloading vessels moving in interstate and foreign commerce was declared invalid under the Commerce Clause. In holding that such a tax is not apportioned to income derived from activities within the taxing state, the court stated (at pages 427-428):

> "The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself."[14]

The activity being taxed in our case, the freezing and cold storage of fish engaged in by the line of business of freezer ships, takes place after the fish are loaded on the vessel

[14] see, also, Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 83, where the court said: ". . . the commencement of the export would occur no later than the delivery of the oil into the vessel." In Michigan-Wisconsin Pipe Line Co. v. Calvert, supra, the activity sought to be taxed included processing after the product, natural gas, had passed into the facilities of the interstate carrier. The tax was declared invalid under the Commerce Clause.

which is to transport them in interstate commerce. Thus, applying the "loading and unloading" test of the Joseph and Richfield Oil Corporation cases, supra, this freezing and cold-storage activity takes place after the flow of interstate commerce has begun, and is therefore an integral part of such commerce.

But, apart from the somewhat mechanical test of whether the activity takes place with or after loading on the interstate vehicle, the rationale of the Joseph decision calls for the same conclusion. In that case loading of cargo on the interstate carrier was held to be an activity in interstate commerce because it involved the transportation vehicle itself and was preliminary to and an essential part of the safety and convenience of that transportation. Likewise here, the freezing and cold-storage activity takes place after the fish are loaded on the interstate carrier and is preliminary to and an essential part of the transportation itself. This freezing and cold storage is solely for the purpose of preserving the fish so that they may be so transported, such transportation being otherwise impossible.

Appellants make no contention that the activity of catching fish in Alaskan waters would not be amenable to a nondiscriminatory local privilege tax. Toomer v. Witsell, supra, establishes that such an activity may be taxed. See, also, Anderson v. Mullaney, supra, page 129. But where, as here, the processing activity constituting the tax event occurs subsequent to loading the product on the interstate carrier and is indispensable to such transportation, any local privilege tax thereon is forbidden by the Commerce Clause.

The judgment is reversed and the cause is remanded with directions to enter judgment for appellants on the tax claims, and to adjudicate the counterclaims.

(Endorsed) Opinion Filed Mar. 23, 1960.

Frank H. Schmid, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15283

ARCTIC MAID and ARCTIC MAID FISHERIES, INC., *Appellants*,

v.

TERRITORY OF ALASKA, *Appellee*.

Judgment

APPEAL from the District Court for the Territory (now State) of Alaska, First Division

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court for the Territory (now State) of Alaska, First Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellee, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment for the appellants on the Tax claims, and to adjudicate the counterclaim.

IT IS FURTHER ORDERED and adjudged by this Court, that the Appellants recover against the Appellee for their costs herein expended and have execution therefor.

(Endorsed) Judgment. Filed and entered March 23, 1960

FRANK H. SCHMID, *Clerk*

APPENDIX C

Section 1, Chapter 82, SLA 1949:

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

"(a) Salmon canneries, both shore based and floating: An annual license tax equal to 4 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year.

"(1) Salmon received by salmon canneries and diverted for the purposes other than canning, would be valued at the average prevailing price on the fresh fish market for that fish and would be subject to an annual license tax of 1 percent of the value.

"(b) Herring processing plants in the business of canning, curing, salting, freezing or making meal or oil or other processed product including sale of bait herring by either processing plant or bait herring fisherman: An annual license tax equal to 1 percent of the value of the raw herring. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or off-

sets to the cash value for gear furnished etc. Such value shall apply to herring caught in company owned or subsidized boats operated by employees of the processor or under lease or other agreement.

"(c) Crab canneries, both shore based and floating: An annual license tax equal to 2 percent of the value of the raw crabs. The raw crab value for the purpose of this license shall be the actual price paid for same either by cash or its equivalent according to the provisions above set forth for herring processing plants.

"(d) Clam canneries: A license tax equal to 2 percent of the value of the raw clams, with value to be determined according to the provisions above set forth for crab canneries will be levied on razor clams.

"(1) Butter clams shall be taxed in the same manner at the rate of 1 percent of the value of raw clams."

APPENDIX D

Section 1, Chapter 97 SLA 1949:

"Section 1. Businesses in Alaska Fisheries Requiring Licenses: Amounts Thereof. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following licenses [license] taxes which are hereby levied:

"(a) Cold storage and other fish processors, except salmon canneries, herring processing plants, crab canneries and clam canneries otherwise licensed: An annual license tax equal to 1% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing, salting or other method. The value of the raw material

under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement."

APPENDIX E

Chapter 113, SLA 1951:

"To amend Chapter 82, Session Laws of Alaska 1949, relating to a license tax on salmon canneries; and declaring an emergency.

"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Subsection (a) of Section 1 of Chapter 82, Session Laws of Alaska 1949, is hereby amended to read as follows:

"(a) Salmon canneries, both shore based and floating: An annual license tax equal to 6 percent of the value of the raw fish purchased or otherwise obtained for canning during the year. For the purpose of this license, such raw fish value of each kind of salmon shall be deemed to be a dollar value equal to 50 percent of the average wholesale price obtained for the finished product by principal canned salmon brokers in Seattle, Washington, during the months of August, September, October, November and December, of the license year."

"Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

"Approved March 24, 1951."